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Date of Decision: 27th November 1995

CRIMINAL APPEAL NO. 52 OF 1989

FOR APPROVAL AND SIGNATURE

THE HONOURABLE MR. JUSTICE A.N. DIVECHA
and
HONOURABLE MR. JUSTICE H.R. SHELAT

1. Whether Reporters of Local Papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether their Lordships wish to see the fair copy of judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

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Shri S.R. Divetia, Addl. Public Prosecutor, for the Appellant

Shri A.P. Mehta, Advocate, for the Respondents

CORAM: A.N. DIVECHA & H.R. SHELAT, JJ.
(Date: 27th November 1995)

ORAL JUDGMENT (per Divecha, J.)
The judgment and order of acquittal passed by the learned Additional Sessions Judge at Rajkot on 17th November 1988 in Sessions Case No. 1 of 1988 acquitting the respondents herein of the offence punishable under sec. 307 read with Sec. 114 of the Indian Penal Code, 1860 (the IPC for brief) as also of the offence punishable under sec. 135 read with sec. 37(1)

of the Bombay Police Act, 1951 (the BP Act for brief) is under challenge in this appeal at the instance of the prosecution.

2. The facts giving rise to this appeal move in a narrow compass. One Shantilal Manga and his friend Babu Kadva were sitting opposite one small Hanuman temple situated at Nava Thorala Gokulpara-3 in Rajkot at about 10.30 p.m. on 27th June 1987. It is the case of the prosecution that at that time the respondents herein appeared on the scene with arms in their hands. Respondent No.1 here was armed with a knife, respondents Nos.2 and 4 with dhariyas and respondent No.3 with an iron pipe. According to the prosecution version, respondent No.1 gave a knife-blow to Shantilal Manga from behind and respondents Nos. 2, 3 and 4 also joined him in assaulting the victim. On seeing assault on the victim, his companion Babu Kadva is stated to have run away from the place of the incident. The injured started shouting for help and also ran away to his house nearby. He was stated to be profusely bleeding at the relevant time. According to the prosecution case, the victim of the assault reported to his wife the names of the assailants. His brother, named, Premjibhai, also came there. The victim is also stated to have informed his brother about the names of the assailants. The injured was carried to the government hospital at Rajkot. It appears that the police was informed of the incident. It appears that, on finding the condition of the injured somewhat serious, the executive magistrate was summoned for recording the dying declaration of the victim of the assault. Apropos, the dying declaration was recorded between 2.15 a.m. and 2.40 a.m. on 28th June 1987 in the hospital itself. Prior thereto, a panchnama about the condition of the injured victim of the assault was also drawn between 1.15 a.m. and 1.30 a.m. on 28th June 1987. Later on the complaint of the incident was given to the police at about 1.45 a.m. on 28th June 1987 by the wife of the injured victim. On completion of investigation, the charge-sheet against the accused was presented before the learned Chief Judicial Magistrate of Rajkot charging the respondents herein with the offence punishable under sec. 307 read with sec. 114 of the IPC and sec. 135 read with sec. 37(1) of the B.P. Act. Since the offence under sec. 307 of the IPC was triable by the court of sessions, the learned Magistrate committed the case to the Court of Sessions at Rajkot for trial and disposal. It came to be registered as Sessions Case No. 1 of 1988. It appears to have been assigned to the learned Additional Sessions Judge of Rajkot for trial and disposal. The charge against the accused was framed on 13th September 1988. No accused pleaded guilty to the charge. They thereupon came to be tried. After recording the prosecution evidence and recording further statement of each respondent herein and after hearing rival submissions, the learned Additional Sessions Judge at Rajkot, by his judgment and order passed on 17th November 1988 in the aforesaid sessions case,

acquitted the respondents of the charge levelled against them. That aggrieved the prosecution. It has therefore preferred this appeal before this Court after obtaining leave from this Court for the purpose.

3. Learned Additional Public Prosecutor Shri Divetia has taken us through the entire evidence on record in an attempt to convince us that the prosecution has unmistakably brought the guilt home to the respondents accused beyond any reasonable doubt. It has been urged by the learned Additional Public Prosecutor that the learned trial Judge was in error in overemphasising trivial contradictions found in the depositions of certain witnesses. As against this, learned Advocate Shri Mehta for the respondents has urged that the prosecution has failed to establish its case against the respondents beyond any reasonable doubt and the impugned judgment and order of acquittal calls for no interference by this Court in this appeal.

4. It may be mentioned that the entire prosecution case rests on the version given by the injured victim. In his deposition at Exh. 22 on the record of the case, he has clearly admitted that he was charged with the murder of one B Division Police Constable, named, Barku Patil and he was acquitted in that case. He has further admitted that he was externed from Rajkot. He has further admitted that he had to face cases for involvement in scuffle with Bhimji Kala and several others. He has also admitted that he had faced two prohibition cases. The oral evidence of the injured victim at Exh. 22 will have to be appreciated in the light of this background.

5. The incident is stated to have occurred around 10.30 p.m. on 27th June 1987. The place of the incident is stated to be near the road opposite the Hanuman temple in Gokulpara. It transpires from the panchnama of the scene of offence at Exh.11 that the place was situated in Dr. Babasaheb Ambedkar Chowk near electric sub-station in Nava Thorala wherein was situated a small temple of Hanuman. It transpires from the evidence on record that it was dark at the relevant time. The injured victim has denied that it was dark at the relevant time but the contradiction with respect to his police statement that it was dark at that time has been brought on record by or on behalf of the defence. The panch witness at Exh. 26 for proving the recovery panchnama at Exh. 27 has also admitted that the lights were off from about 8 p.m. on the date of incident. In such darkness of night, the injured victim at Exh. 22 on the record of the case is stated to have identified his assailants.

6. The panchnama of the scene of offence at Exh. 11 strangely enough does not support the prosecution version about the place of the incident. Even at the cost of repetition, we

should like to reiterate that the prosecution story is to the effect that , at the place opposite or near the small temple of Hanuman in Dr. Babasaheb Ambedkar Chowk near the electric sub-station the injured victim was assaulted by the respondents herein. It is the prosecution story that at least three of them were armed with sharp cutting instruments. It is also the case of the prosecution that respondent No.1 herein assaulted the injured victim with his knife and thereupon the injured victim started bleeding profusely. The panchnama of the scene of offence at Exh. 11 clearly shows that no blood or bloodstains were found at the so-called place of the incident. It transpires therefrom that the panchnama was drawn between 3.30 a.m. and 4.15 a.m. on 28th June 1987. As pointed out earlier, it was a dark night. It is not the prosecution case that the place at the relevant time had high frequency of vehicular and pedestrian traffic. In that view of the matter, if a person assaulted with a sharp cutting instrument like a knife and is reported to have bled profusely at the relevant time, at least some bloodstains would be found at the place of the incident even if it is accepted that no blood might be found thereat. Absence of blood or bloodstains at the place of the incident would render the prosecution version somewhat doubtful.

7. It clearly transpires from the panchnama at Exh. 11 that bloodstains were found near the window of the house of the injured victim. In fact, on a closer scrutiny thereof, it is found therefrom that some blood pool was found in the corner of the room of the injured victim near the window. The prosecution has not chosen to explain in clear terms how a pool of blood was found collected at that place and no blood was found at the place of the incident. The defence has tried to suggest to the injured victim in his deposition at Exh. 22 on the record of the case that, while he was sitting near the window of his house at the relevant time, some unknown assailant or assailants assaulted him with some sharp cutting instrument. In view of the aforesaid evidence on record, the defence version appears not to be improbable. The possibility of assault by some unknown assailants while the injured victim was near the window of his house cannot altogether be ruled out keeping in mind the fact that, apart from other cases, he had to face a murder trial resulting in his acquittal.

8. That apart, the prosecution version has its own inherent weaknesses. Some contradictions, though appearing trivial in the first blush, might assume importance if cumulative effect thereof is considered. The name of the wife of the injured victim is stated to be Laxmiben. Her name is recorded as Rashmiben in the complaint at Exh. 31. Her name as Rashmiben also figures in the panchnama regarding the condition of the injured at Exh. 8 on the record of the case. The prosecution has not chosen to explain how that name came to be written

incorrectly in these two important documents.

9. Prosecution Witness No. 3, named, Babu Kadva at Exh. 23, is stated to be an eye witness of the incident. In his chief examination he does not rope in respondent No.. 4. He is reported to be in the company of the injured victim at the relevant time. In his police statement he has not said so. The contradiction in that regard has been brought on record. The conduct of the witness at Exh. 22 is also somewhat unnatural. He is reported to have seen the assault on the victim. He is stated to have run away from the place fearing likely assault on him also. That could be natural. What is unnatural is that he does not go to his companion's house for informing the wife of the injured victim or his other relatives about the occurrence of such incident. In his cross-examination the witness at Exh. 23 admits that the police station is hardly at a distance of 5 or 10 minutes on foot from the place of the incident. He has also admitted that the police station was on the way to the government hospital. In spite of the vicinity of the police station, the witness at Exh. 23 has not chosen to go to the police station to report the incident or to seek police protection for his companion if not for himself. This unnatural conduct on the part of the witness at Exh. 23 would render his version somewhat doubtful.

10. We do not propose to highlight or overemphasise some minor contradictions found in the testimony of the wife of the injured victim at Exh.25 and that of his brother at Exh.24. She has stated in her evidence that she and her husband were residing in the joint family with parents. The witness at Exh. 24 has contradicted her by saying that his brother was staying separately from the family. The wife at Exh. 25 has stated that her husband came to the house in a bleeding condition and thereupon she went to his elder brother for assistance or help. The brother at Exh. 24 has again contradicted her by saying that he heard shouts of the injured victim and he therefore rushed to his house. As observed by us earlier, these contradictions might appear to be too trivial to be highlighted or overemphasised in the first blush. Their cumulative effect however cannot be ignored.

11. The recovery of the so-called weapons of offence from the respondents herein is also shrouded in mystery. The panchnama in that regard at Exh.. 7 on the record of the case does not show any bloodstains on any of the weapons of offence. So far as the knife stated to have been used by respondent No. 1 at the relevant time for the purpose is concerned, it is found mentioned in the panchnama at Exh.. 7 that no bloodstains were found but it was found that bloodstains were wiped out by washing it in water. On what basis that opinion was formed is anybody's guess. So the recovery panchnama also becomes

doubtful in view of the panch witness at Exh. 27. In his cross-examination he says that his signature on the panchnama was taken at his residence by the police the next morning.

12. That brings us to the so-called dying declaration of the injured victim at Exh. 10. The man has survived, and as such it loses its significance as his dying declaration. It will have to be read as his previous statement. It is stated to have been recorded between 2.15 a.m. and 2.40 a.m. on 28th June 1987. Neither the doctor is examined to support the certificate given by him that the patient was conscious all throughout nor the Executive Magistrate has been examined to support recording of the dying declaration. It was perhaps not necessary for the prosecution to do so in view of the fact that it was admitted to evidence at the instance of the defence. We may accept it that the doctor's certificate was to the effect that the patient was conscious all throughout. His brother at Exh. 24 has stated in his cross-examination that about 1 1/2 hours after he was taken to hospital he was given blood and at that time he had become unconscious and that condition continued till the next morning. The witness at Exh. 24 has further stated that the patient was able to speak while he was taken to hospital and was able to speak till oxygen was given to him. It transpires from the evidence on record that the patient was carried to hospital at about 11.30 p.m. on 27th June 1987. It transpires from the panchnama at Exh. 8 about the patient's condition at the relevant time drawn between 1.15 a.m. and 1.30 a.m. on 28th June 1987 that oxygen was being given to him at the relevant time. The patient would be unconscious at that time in view of the evidence of his brother at Exh. 24 on the record of the case. The brother at Exh. 24 has clearly stated in his cross-examination that the state of unconsciousness continued till the next morning. The so-called dying declaration at Exh. 10 on the record of the case is stated to have been recorded between 2.15 a.m. and 2.40 a.m. on 28th June 1987. Even if the version given by the patient's brother at Exh. 24 is accepted, the patient was unconscious at that time. He could not have given any dying declaration. The certificate given by the doctor below it appears to be incorrect. This dying declaration at Exh. 10 on the record of the case also cannot be accepted as a true version of the story in the previous statement given by the injured victim.

13. The so-called dying declaration at Exh. 10 on the record of the case contains a very detailed and graphic account of the incident in question. The person who is profusely bleeding and who is required to be given oxygen would not ordinarily be in a position to give such a detailed and graphic account of the incident. Besides, such detailed account could not have been over within 25 minutes keeping in mind the condition of the patient at the relevant time. That by itself

would render such previous statement of the injured victim somewhat improbable and unnatural.

14. In view of our aforesaid discussion, we are of the opinion that the prosecution has not been able to bring the guilt home to the accused or any of them beyond any reasonable doubt. The impugned judgment and order of acquittal passed by the learned trial Judge calls for no interference by this Court in this appeal.

15. In the result, this appeal fails. It is hereby dismissed. It appears that, by the order passed by this Court on 30th March 1989, bailable warrant in the sum of Rs. 3000 was ordered to be issued in case of each respondent. Respondents Nos. 1, 2 and 4 furnished bail bonds but respondent No. 3 does not appear to have furnished bail bonds and he was therefore taken in custody and was not released on bail. He is therefore languishing in jail at present. In view of the affirmation of the judgment and order of acquittal, respondent No.3 herein is ordered to be released forthwith if no longer required in any other case. The bail bonds furnished by the other respondents are ordered to be cancelled.